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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001523-ME

CHRISTINA JUSTICE APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY DIVISION TEN (10)
HONORABLE PAULA F. SHERLOCK, JUDGE
ACTION NO. 13-CI-503651

JASON BEACH APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, MAZE, AND NICKELL, JUDGES.

GOODWINE, JUDGE: Christina Justice (mother) appeals from a judgment of the Jefferson Family Court awarding joint custody and unsupervised visitation of the parties' child to her father, appellee Jason Beach (father). She also challenges the family court's conclusions regarding retroactivity of child support, childcare cost

reimbursement, and contempt. After reviewing the record in conjunction with applicable legal authority, we affirm the judgment of the family court.

BACKGROUND

Although father and mother never married, their relationship resulted in the birth of a child in March 2013. When the child was approximately six months old, father filed a petition seeking joint custody and parenting time with her. Mother responded by filing a counter-petition for sole custody in which she alleged that father had been involved in an inappropriate relationship with D.W., mother's emancipated daughter from a previous relationship. Mother also alleged that father had inappropriately touched their child while she was in his custody.

After conducting a hearing in June 2014, the family court entered a temporary order restricting father to supervised visitation with the child. In addition, the family court ordered father to submit to a Sex Offender Risk Assessment with a court-appointed expert, Dr. Ida Dickie. However, because father had never been convicted of a sex crime, Dr. Dickie performed a Forensic Sexual Deviancy Evaluation which included a clinical interview with father, collateral interviews, as well as psychological and psychometric testing.

The family court also appointed Forrest Kuhn, an attorney, to prepare a report concerning custodial arrangements for the child. The family court directed Mr. Kuhn to investigate the issues raised by both parents regarding the health,

safety, and welfare of the child; to make recommendations on a parenting schedule or modification of such a schedule; to communicate with therapists when necessary; to recommend appropriate mental health treatment for the minor child and parents; and to report to the family court on the status of the case as necessary. In June 2015, Mr. Kuhn issued his first report recommending that mother have temporary sole custody and that father be granted reasonable visitation rights which should expand over time, noting that in his opinion, due to the antagonistic relationship between mother and father, they would not be able to successfully co-parent the child. He also recommended that the family court review the temporary visitation schedule in one year and that the review be *de novo*. Although Mr. Kuhn filed a supplemental recommendation in 2017 indicating that he had interviewed additional witnesses, he made no further recommendations.

Dr. Ida Dickie filed her report which the family court sealed upon request. In essence, Dr. Dickie found no sexual abuse by father toward the child; found that father did not exhibit any indicators suggestive of sexually deviant or aggressive behavior; and questioned the allegations of mother's older daughter D.W. that father had engaged in inappropriate sexual behavior toward her. On the basis of her findings, Dr. Dickie determined that there was a low probability that father would exhibit inappropriate sexual behavior toward the child.

In the course of hearings conducted on January 13, 2017, and April 14, 2017, the family court heard from twelve different witnesses and reviewed two depositions before entering the judgment which is the subject of this appeal. The family court ultimately determined that it was in the child's best interest to have a relationship with both parents; awarded joint custody; maintained mother's status as primary residential custodian; granted father unsupervised visitation; and ordered that his visitation be expanded over time.

This appeal follows the denial of mother's motion to alter, amend or vacate that judgment.

STANDARD OF REVIEW

As this Court explained in *Varney v. Bingham*, 513 S.W.3d 349 (Ky. App. 2017), the following standard of review is applicable to any custody dispute:

> Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Id. at 351-52 (citing *Coffman v. Rankin*, 260 S.W.3d 767 (Ky. 2008)).

ANALYSIS

"While a court is not required to wait for children to be harmed before it considers a parent's conduct, there should be credible evidence to suggest that the conduct has actually or is likely to put the child at risk of harm." *Id*. at 353. A thorough review of the record in this case makes clear that, before making a final determination on custody and visitation, the family court weighed each and every allegation made against both parents concerning the welfare of this child. With the clear standard of our review in mind, we turn to the first issue mother advances in this appeal: that the family court lacked authority to appoint a friend of the court under Kentucky Revised Statutes ("KRS") 403.090 and KRS 403.300. The opinion of the Supreme Court of Kentucky in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), is dispositive of that contention:

> In sum, courts addressing custody and visitation disputes have broad rule and statutory authority to obtain the assistance of various professionals to help them understand the custodial situation and to make a determination as to the child or children's best interest. That authority includes the ability to appoint an attorney as a **de facto friend of the court** to investigate the circumstances on the court's behalf, to file a report summarizing his or her findings, and to make custodial recommendations. Unless otherwise provided by statute or rule, persons, including attorneys, engaged by the court in this manner to supply it with information must promptly be made known to the parties, their reports and their sources must be disclosed, and if duly summoned they must appear at the final hearing for cross-examination. Also unless otherwise provided, the fee or

> fees owing to such persons shall be determined by the court and charged to the parties as costs.

Id. at 118 (emphasis added).

Thus, contrary to mother's contention that the family court impermissibly impinged on the authority ascribed to each county's fiscal court in KRS 403.090(1), the family court rightfully exercised the authority given it in KRS 403.300 and the Family Court Rules of Procedure and Practice (FCRPP). In fact, the court in *Morgan* notes that although KRS 403.090 remains in effect, it appears to have "largely lapsed into a state of disuse" primarily due to the fact that county attorneys have assumed many of the duties previously the province of the friend of court and the "reluctance or inability of our counties to fund the position." *Id.* at 104 (footnote 4). The *Morgan* court also made clear FCRPP 6(2) gives the family court authority to order:

> one or more of the following, which may be apportioned at the expense of the parents or custodians:
>
> (a) A custody evaluation;
>
> (b) Psychological evaluation(s) of a parent or parents or custodians, or child(ren);
>
> (c) Family counseling;
>
> (d) Mediation;
>
> (e) Appointment of a guardian ad litem;

> (f) Appointment of such other professional(s) for opinions or advice which the court deems appropriate; or,
>
> (g) Such other action deemed appropriate by the court.

Id. at 106. Notable for purposes of the issue before us is subsection (f) giving the family court direct authority to appoint such "other professional(s) for opinions or advice which the court deems appropriate."

In this case, the family court appointed an attorney to investigate all the issues raised by either parent regarding the child's best interests. In his report, Mr. Kuhn adequately addressed the allegations of mother and her daughter D.W. concerning their claims of father's inappropriate behavior toward D.W. As the family court pointed out in its opinion, mother's complaints concerning the attorney's report arose only after he submitted it to the court.

Mother also specifically objects to the report containing any opinion testimony. However, the very purpose of a friend of the court is to act as "a child's representative appointed as an officer of the court to investigate the child's and the parents' situations, to file a report summarizing **his or her findings**, and **to make recommendations** as to the outcome of the proceeding." *Nein v. Columbia*, 517 S.W.3d 492, 499 (Ky. App. 2017) (citing *Morgan*, 441 S.W.3d at 111) (emphasis added). Mr. Kuhn's report reflected that he had interviewed numerous persons, including expert witnesses, as well as mother and D.W., and made his recommendations based upon his analysis of those interviews. Further, Mr. Kuhn

was present and testified at the hearing, thus affording mother an opportunity to cross-examine him on each of his specific recommendations.

Neither do we conclude that the family court impermissibly delegated its authority or violated the separation of powers doctrine in appointing an expert to assist the court as specifically provided for by statute and family court rule. As this Court stated in *Maclean v. Middleton*, 419 S.W.3d 755 (Ky. App. 2014):

> we also note that the trial court has the discretion to appoint experts who may assist the court in its fact-finding duties. Kentucky Rule of Evidence (KRE) 706(a). While Mulloy was designated as a "Master Commissioner" in this case rather than an expert witness, the practical effect was the same.

Id. at 760-61. So it is in this case. Whether Mr. Kuhn is designated a friend of the court or simply an expert appointed to assist the family court in its decision-making process, the bottom line is that there is statutory and court-rule authority for the appointment. Our review of the record discloses no abuse of the family court's authority in the appointment process or in its use of the expert's report in its decision-making function. The family court appointed Mr. Kuhn in accordance with the authority granted by statute and family court rule and the record confirms that he based his report and recommendations upon facts and information obtained as part of his investigation. We therefore find no error in Mr. Kuhn's appointment nor in the family court's utilization of his recommendations.

Finally in this regard, even were we to consider mother's separation of powers argument as a challenge to the constitutionality of the statute giving trial courts authority to appoint experts, we would decline to consider it due to her failure to comply with CR 24.03 requiring notice to the Attorney General when the constitutionality of a statute is called into question.

Mother next complains that Dr. Dickie did not perform the sex offender evaluation which the family court originally ordered and relied upon facts which were ultimately not proven to be true. She also asserts that Dr. Dickie cited discredited science. Our review of Dr. Dickie's report confirms that she utilized the appropriate test, the Forensic Sexual Deviancy Evaluation, because father did not have an underlying conviction of a sexual offense which is a prerequisite for use of the evaluation the family court originally ordered. In her final report, Dr. Dickie concluded that nothing in the results of father's evaluation suggested that he would act inappropriately with the child or pose any threat to her in the future. Dr. Dickie based her opinion upon father's clinical interview, test results, and her interviews of witnesses, including mother and D.W. Dr. Dickie was present at trial and subject to cross-examination as to the findings in her report, her evaluation of father, and the methodologies she employed to reach her conclusions. The family court in its role as fact-finder was well-within its authority to weigh the evidence and assess the credibility of witnesses. Nothing in this record would allow us to

disturb the family court's conclusions as to the weight of Dr. Dickie's report and testimony.

Mother next argues that it is in the child's best interest that she be awarded sole custody and that father be limited to supervised visitation. The record contains substantial evidence, testimony, and interviews demonstrating that the child's interests would be best served by having a relationship with both her mother and her father. Although mother continues to insist that father's behavior toward D.W. is an indicator that he will sexually abuse the child in the future, both Dr. Dickie and Mr. Kuhn raised concerns as to the truthfulness of D.W.'s allegations, noting that she never mentioned any abuse until shortly after father sought joint custody of the child. There was also evidence in both of their reports that D.W. was sexually active with other partners and that she had deleted the pictures and texts which she relied upon as demonstrating father's inappropriate behavior toward her. Based upon this state of the record, the family court acted well-within its discretion in concluding that mother's and D.W.'s allegations against father were unsubstantiated and that there was no *evidence* that father posed any past or future threat to the child.

In determining that joint custody is in the best interest of the child, the trial court entered the following findings:

> The Court took Mother's allegations seriously and promptly responded by subjecting Father to supervised

> visitation with A.J. [child], and by appointing Dr. Dickie to conduct the appropriate evaluation. However, having heard the proof at trial, there is no compelling evidence before the Court to warrant a custody determination other than joint custody. Further, Mother has made unsubstantiated allegations against Father, which raise concern about the possibility of Mother's intent to alienate A.J. from Father. Both parents have been involved in A.J.'s life even though Father's contact has been limited and supervised by order of the Court. Although parents' inability to co-parent impacts custody determinations in favor of sole custody, in this case, Mother's various allegations against Father raise concerns that she will place many roadblocks between Father and the child.

As this Court clearly explained in *Hunter v. Mena*, 302 S.W.3d 93 (Ky. App. 2010), "[d]eciding which witness to believe is within the sound discretion of the family court as fact-finder; we will not second-guess the family court, which had the opportunity to observe the parties and assess their credibility. CR 52.01." *Id.* at 98.

Furthermore, concerning the grant of unsupervised visitation, the trial court noted that father had maintained consistent parenting time with the child, making an eleven-hour round-trip drive from his home near Cleveland, Ohio to Louisville in order to exercise his one hour of supervised visitation. He regularly made this trip despite the fact that, upon his arrival in Louisville, mother failed on more than one occasion to make the child available for the scheduled supervised visitation. The family court heard testimony from an employee of Family and

Children's Place, the facility where the supervised visitations took place, that there had been no concerns throughout the course of father's supervised visits and that the child seemed to enjoy her visits with her father. The family court's conclusions regarding custody and visitation are supported by substantial evidence of record, including the report from of the supervised-visitation worker and the extensive reports and testimony of both Mr. Kuhn and Dr. Dickie. Because the family court is the sole arbiter of which party presented the more compelling case, an appellate court may not substitute its judgment concerning factual determinations if based upon substantial evidence. *Id*. Our review of the record discloses substantial evidence supporting the family court's findings as to custody and visitation. We therefore perceive no error in its decision on either issue.

Mother raises three final issues for reversal: 1) that the family court erred in failing to make the award of child support retroactive to the date of birth of the child's birth; 2) that the family court erred in separating work-related child care expenses from the award of child support; and 3) that the family erred in holding her in contempt without sufficient evidence supporting father's allegation that she had divulged the contents of a sealed report without court permission. Again, we find no error in the family court's analysis and conclusions on these issues.

First, we note that the family court did not rule on mother's claim that child support should have been made retroactive to the date of the child's birth.

Because mother failed to request additional findings on this issue, we are precluded from reviewing it:

> In particular, CR 52.04 requires a motion for additional findings of fact when the trial court has failed to make findings on essential issues**. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal.** *Cherry v. Cherry*, Ky., 634 S.W.2d 423 (1982). The thread which runs through CR 52 is that a trial court must render findings of fact based on the evidence, but no claim will be heard on appeal unless the trial court has made or been requested to make unambiguous findings on all essential issues.

Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997) (emphasis added.) Despite the fact that mother cites to her motion to alter, amend, or vacate as preserving this issue for our review, the family court failed to make any specific findings regarding the retroactivity of the child support award either in the final judgment of in its order denying her post-trial motion. It was therefore incumbent upon mother to bring the issue to the attention of the family court by making a written request for clear and unambiguous findings concerning the retroactivity of the child support award. *Id.* Her failure to do so is fatal to our review of the matter in this appeal.

Mother also complains that the family court erred in separating work-related child care costs from the award of child support. As support for this contention, mother argues only that it was error to require her to seek

reimbursement for these expenses from father in light of the family court's finding that the parties are unable to communicate. We perceive no error.

The family court specifically found that "Father shall reimburse Mother for future work-related childcare to occur monthly upon proof of expenses." The parties need not communicate for this to occur. Mother is only required to provide proof of her work-related childcare expenses to obtain reimbursement. In establishing support, KRS 403.211 provides that in addition to setting an appropriate award under the guidelines:

> (6) The court shall allocate between the parents, in proportion to their combined monthly adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines.

Nothing in the statute requires lumping child support and childcare reimbursement into one sum. The family court did not err.

Finally, mother asserts that the family court erred in finding her to be in contempt based solely on father's unsupported allegation she revealed the contents of Dr. Dickie's sealed report in violation of the court's order. Father testified at trial that many people knew the contents of the report which could not have occurred unless mother had divulged the report to them. In its order, the family court noted that it had previously admonished mother about cancelling scheduled visitation which resulted in father filing three previous contempt

motions. The family court ultimately determined that, based upon the evidence adduced at trial, mother had violated its order sealing the report. Thus, after hearing conflicting testimony on the issue, the family court simply concluded that father's version of events was more credible. We again reiterate the well-established principle that "[d]eciding which witness to believe is within the sound discretion of the family court as fact-finder[.]" *Hunter*, 302 S.W.3d at 98. And, as in *Hunter*, this Court will not second-guess the family court which "had the opportunity to observe the parties and assess their credibility." *Id.*

CONCLUSION

Based upon the foregoing, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

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